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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-129

No. 1007

RONALD E. CLARK, M.D.,
Petitioner,

vs.

PEOPLE OF THE STATE OF MICHIGAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Opinion of Division One, Michigan Court of Appeals, is reported at *People v. Clark*, 26 Mich App 475, 182 NW 2d 632 (1970). The Michigan Supreme Court's denial of discretionary leave to appeal is reported at *People v. Clark*, 384 Mich 801 (1971).

JURISDICTION

Respondent denies that this Court has jurisdiction pursuant to 28 U.S.C. §1257(3) because this Petition for Certiorari does not present a substantial Federal question.

QUESTIONS PRESENTED

I. Whether a criminal conviction in a State Court violates the Fourteenth Amendment to the United States Constitution when said conviction is predicated, in part, upon secondary evidence of two documents (the originals being lost by State Authorities) when Defendant is free on bond a full six months prior to trial and personally makes no attempt to secure said documents, where no proper objection to testimony regarding said documents is raised at trial and where said documents are but one scintilla of an overwhelming supply of competent evidence of Defendant's guilt?

> The trial court was not asked to pass upon this question at trial.
> The Michigan Court of Appeals said "No."
> The Michigan Supreme Court felt the matter to be so insignificant that it denied discretionary review.
> Respondent believes the answer is "No."

II. Whether the Fourteenth Amendment to the United States Constitution is violated in a criminal conviction in a State Court where the trial judge allows expert testimony as to a highly sophisticated medical transaction, said expert testimony being predicated on actual evidence found

in the trial transcript, and generally received into evidence in the absence of Defendant's objection?

The trial court was not asked to answer this question at all during trial and when asked to answer one portion of it, it was too late pursuant to Michigan law.

The Michigan Court of Appeals was not asked to pass upon this question.

The Michigan Supreme Court felt the matter to be so insignificant that it denied discretionary review.

Respondent believes the answer is "No."

III. Whether the Fourteenth Amendment to the United States Constitution is violated when, in a State criminal conviction of Involuntary Manslaughter, in which Defendant is charged by Information which specifically pleads certain acts of gross negligence, the State introduces other evidence of Defendant's gross negligence admittedly not specifically plead but which, are a part of the *res gestae* of the crime with which he is charged?

The trial court was not asked to answer this precise question.

The Michigan Court of Appeals answered this question "No."

The Michigan Supreme Court felt the matter to be so insignificant that it denied discretionary review.

Respondent believes the answer is "No."

RESPONDENT'S STATEMENT OF CASE

(All numbers found in parentheses and preceded by the prefix "R" refer to the corresponding pages of the trial transcript.)

The instant Petition treats a Michigan criminal prosecution of Ronald E. Clark, M.D., for the crime of Involuntary Manslaughter in violation of Michigan Compiled Laws Annotated §750.320 (Stat Ann 1954 Rev. §28.553). Petitioner was convicted by jury on June 28, 1968 (R. 523), and subsequently sentenced to serve not less than three (3) nor more than fifteen (15) years under the jurisdiction of the Michigan Department of Corrections. Petitioner's Motion for a New Trial was subsequently denied by the trial judge. Petitioner's appeal as a matter of Constitutional Right (Art. I, §20 of 1963 Michigan Constitution) was duly heard by a panel of three judges of Division One, Michigan Court of Appeals, and on September 28, 1970, was unanimously determined adversely to Petitioner. On January 22, 1971, the Michigan Supreme Court unanimously denied the Petitioner's request for discretionary review (22). Petitioner has been incarcerated since the date that the jury returned the verdict (R. 525).

Interspersed between Petitioner's jury conviction, and its affirmation by the Michigan Court of Appeals, Petitioner filed several motions in the Court of Appeals requesting that certain specimens of the decedent's body, organs, blood be given Petitioner for independent scientific examination. These motions were vigorously resisted by the Prosecution for several reasons: (1) The proper forum for initially raising such issue was before the trial court, (2) That the motions were not properly preserved inasmuch as Petitioner had now been convicted by jury and the time to consider such matter had passed, and (3)

That the Michigan General Court Rules do not provide for discovery in criminal cases [GCR 1963, 785.1(2)]. Furthermore, it is essential to note that the record clearly emasculates Petitioner's request inasmuch as it is clear that, *prior to trial*, the Prosecution did, in fact, make every specimen available to the defense for the latter's independent scientific examination (R. 329-30) (See, also, Pg. 7, of Petitioner's Brief for an admission of such fact).

At trial there was competent testimony that Petitioner, a licensed medical doctor, had stated that he was treating the deceased for obesity (R. 73, 74), high blood pressure (R. 74, 113) and heart disease (R. 74, 113) by utilizing Sodium Pentothal as a therapeutic medication. A formidable array of qualified medical experts testified that Sodium Pentothal has no recognized therapeutic value in medicine (R. 79, 128, 150, 156-57, 240) and the results of decedent's autopsy amply illustrated that she had no heart disease (R. 37, 38), no high blood pressure and was of average weight(R. 38). As a matter of fact, a board certified anesthesiologist testified that Sodium Pentothal is medically *contraindicated* (R. 151) when one has heart disease.

Doctor William E. Gordon, a board certified psychiatrist testified that, from a psychiatric point of view, Sodium Pentothal is contraindicated in cases of obesity (R. 270-71). Two qualified toxicologists testified that the quantity of Sodium Pentothal in decedent was excessive (R. 46, 123) and Doctor Gordon, the psychiatrist, testified that the amount of Sodium Pentothal found in decedent was "completely unheard of" because it was so excessive (R. 269).

Predicated on the above testimony, and other physical and verbal evidence, Petitioner was quickly found guilty by a jury of his peers.

Through all stages of the proceedings of the proceedings Petitioner was represented by able counsel. A Motion for Change of Venue was granted by the trial judge and several of Petitioner's Motions for Adjournment were granted in order to allow the Defendant additional time for trial preparation. Petitioner was free on bond for approximately six months prior to trial.

ARGUMENT

I.

A CRIMINAL CONVICTION IN A STATE COURT DOES NOT VIOLATE THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN SAID CONVICTION IS PREDICATED, IN MINUTE PART, UPON SECONDARY EVIDENCE OF TWO DOCUMENTS (THE ORIGINALS BEING ADMITTEDLY LOST BY STATE AUTHORITIES) WHEN DEFENDANT IS FREE ON BOND A FULL SIX MONTHS PRIOR TO TRIAL AND PERSONALLY MAKES NO ATTEMPT TO SECURE SAID DOCUMENTS, WHERE NO PROPER OBJECTION TO TESTIMONY REGARDING SAID DOCUMENTS IS RAISED AT TRIAL, AND WHERE SAID DOCUMENTS ARE BUT ONE SCINTILLA OF AN OVERWHELMING SUPPLY OF COMPETENT EVIDENCE OF DEFENDANT'S GUILT.

There simply can be no question that "suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material . . . to guilt . . . irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland,* 373 US 83, 87, 10 L. Ed 2d 215, 218, 83 S. Ct 1194 (1963). Petitioner is incorrect when he states that "Bad faith by the prosecution seems to be at the bottom of the rule" (Petitioner's Brief, Pg. 12) inasmuch as *Brady* indicates the reason for suppression is

immaterial if, in fact, the evidence was material to Petitioner's guilt or innocence. Respondent has never denied that this legal principle governs; however, Respondent has always contended that there is *no factual suppression* in this case.

The Michigan Court of Appeals did not, as Petitioner would have this Court believe, answer his stated question in the negative. That Court did consider whether the State suppressed documents favorable to Petitioner and held against him because there was no factual showing of suppression. Chief Judge Lesinski wrote:

> "Defendant now asserts, as he did on motion for new trial, that a request for production of the records was made prior to trial on March 15, 1968. While it does appear from documents filed with our Court that the request for production of these records was made, it would not follow from the fact that the request was not complied with, that the people deliberately withheld or suppressed evidence favorable to the defendant; no evidence showing deliberate withholding or suppression of evidence was offered in support of the motion for new trial.
>
> Since the matter of the production of the medical records was never presented to the trial court for full appraisal, this Court cannot now determine whether there was any basis in fact for the claim that the medical records of treatment were suppressed. Where a defendant relies upon evidence *dehors* the record to set aside his conviction, the claim and the evidence in support of the claim ordinarily must be presented at the trial level in order to preserve the issue for appeal. (Emphasis original.)
>
> *People v. Clark*, 26 Mich App. at 478.

It is the general rule in Michigan that matters not objected to during trial are not properly preserved for appellate review. *People v. Farmer*, 380 Mich 198, 156 NW 2d

504 (1968); *People v. Shirk,* 383 Mich 180, 174 NW 2d 772 (1970). Such practice is apparently common in most states and certainly not inconsistent with rulings of this Court. See *Henry v. Mississippi,* 379 US 443, 13 L. Ed 2d 408, 85 S. Ct 564 (1965); *Beck v. Washington,* 369 US 541, 8 L. Ed 2d 98, 82 S. Ct 955 (1962); *In Re Lamkin,* 355 US 59, 2 L. Ed 2d 107, 78 S. Ct 137 (1957). At most, this Court, if it accepts all of Petitioner's claims as being valid (which they certainly are not), would remand to the state court for a hearing. *Henry v. Mississippi, supra; Giles v. Maryland,* 386 US 66, 17 L. Ed 2d 737, 87 S. Ct 793 (1967). While it does not appear anywhere in the trial transcript, the certified record of this matter should contain copies of letters, orders, etc. from the Michigan Court of Appeals to Respondent's counsel to furnish that Court with copies of all relevant documents and records in the State's possession. This was done with the exception of the two lost treatment cards. Thus, in a sense, Petitioner has had his remand to the state courts.

Petitioner was aware that these medical records were in the custody of State officials a full six months prior to trial. (See, Opinion of Michigan Court of Appeals, Petitioner's Brief, Pg. 37a). While it is true that his counsel requested that Respondent provide the form with said teratment cards, and that these treatment cards were reportedly lost and not, in fact, provided Petitioner, the matter was never properly raised prior to jury verdict. Michigan law provides a procedure for raising such questions *prior* to trial. *People v. Maranian,* 359 Mich 361, 102 NW 2d 568 (1960); *People v. Brocato,* 17 Mich App 277, 169 NW 2d 483 (1969). This procedure was not followed. Respondent does not believe that this Court will hold that Michigan's well-reasoned rule that in order to properly preserve such matters for appeal the alleged impropriety

should be raised prior to trial, before the trial judge and by written motion, does not serve a "legitimate state interest." *Henry v. Mississippi*, 379 US at 448, 13 L. Ed 2d at 413.

Finally, Respondent points out that failure to produce these treatment cards was harmless error beyond a reasonable doubt. *Chapman v. California*, 386 US 18, 17 L. Ed 2d 705, 87 S. Ct 824 (1967); *Harrington v. California*, 395 US 250, 23 L. Ed 2d 284, 89 S. Ct 1726 (1969). The Statement of the Case set out in the beginning of this Brief, and the facts found in the Michigan Court of Appeals Opinion, clearly show that Petitioner's conviction had little if anything to do with non-production of treatment cards.

In the state courts Petitioner illustrated a disturbing propensity to resort to personal invective and to matters not contained in the record. His "Statement of the Case," for example, (Petitioner's Brief, Pg. 2-3) is not supported at all by any *testimony* in the record but only by his attorney's opening statement. A party's opening statement is simply not probative evidence. Furthermore, the non-sequiter found at Pg. 5 of Petitioner's Brief, treating the trial judge's handling of a Diathermy Burn case involving a Judgment with a "blank line for the amount," is slander foreign to this record. Probably it is also false but because it is not contained within the record, Respondent can only judge the statement's veracity by the character of its author.

Petitioner's statement that the defense expert, Doctor Roy Aston, examined the deceased's body organs and determined that "no (Sodium) Pentothal was present in appreciable quantities" (Petitioner's Brief, Pg. 7) does not find factual support in this record. Petitioner cites this Court to an administrative hearing held *subsequent* to his

Manslaughter conviction (See PP. 31a-34a). Petitioner does admit that "the defense (did have) an opportunity to have an independent expert examine the body organs for Pentothal" prior to trial but that "his testimony was not used by the defense . . ." (Petitioner's Brief, Pg. 7). One must ask why the Petitioner did not call Doctor Aston at trial? The material found at pages 1a, 2a, 3a, 4a (partially), 12a, 31a, 32a, 33a, 34a, 35a and 36a (partially) are not portions of the record in this matter and have no proper place in Petitioner's Brief.

Respondent understands the Michigan rule of review to be compatible with decisions of this Court, to-wit: the Court reviews only material found in the record. *Carter v. Illinois*, 329 US 173, 91 L. Ed 172, 67 S. Ct 216 (1946); *Lawn v. United States*, 355 US 339, 2 L. Ed 2d 321, 78 S. Ct 311 (1958); *Russell v. Southard*, 53 US 139, 13 L. Ed 927, 12 How 139 (1851).

Petitioner's first question is so lacking in merit and factual support as to be totally unworthy of this Court's consideration.

II.

THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS NOT VIOLATED IN A CRIMINAL CONVICTION IN A STATE COURT WHEN THE TRIAL JUDGE ALLOWS EXPERT TESTIMONY AS TO A HIGHLY SOPHISTICATED MEDICAL TRANSACTION, SAID EXPERT TESTIMONY BEING PREDICATED ON ACTUAL EVIDENCE FOUND IN THE TRIAL TRANSCRIPT, AND GENERALLY RECEIVED INTO EVIDENCE IN THE ABSENCE OF DEFENDANT'S OBJECTION.

The second question presented by Petitioner is again not supported by the record and, more importantly, inundated by subjective and erroneous conclusions of Petitioner's counsel.

Thompson v. City of Louisville, 362 US 199, 4 L. Ed 2d 654, 80 S. Ct 624 (1960), does indeed stand for the proposition that to convict an accused of a crime which has no evidentiary support is a violation of the Fourteenth Amendment. Recognizing this principal, Respondent is at a loss to ascertain how *Thompson* applies in this case.

Petitioner was charged with Involuntary Manslaughter. The applicable Michigan statute reads as follows:

> "Any person who shall commit the crime of manslaughter shall be guilty of a felony punishable by imprisonment in the state prison, not more than 15 years or by fine of not more than $7,500 dollars, or both, at the discretion of the court."
>
> MCLA §750.321.

It is settled constitutional law that this Court must accept the construction of a state statute as the state courts have construed the legislative enactment. *Kingsley Corp. v. Regents of U of N.Y.*, 360 US 684, 3 L. Ed 2d 1512, 79 S.

Ct 1362 (1959; *Groppi v. Wisconsin,* — US —, 27 L. Ed 2d 571, 91 S. Ct 490 (1971).

In *People v. Orr,* 243 Mich 300, 220 NW 777 (1928), the Michigan Supreme Court identified three elements necessary to establish Involuntary Manslaughter:

> (1) Knowledge of a situation requiring the exercise of ordinary care and diligence to overt injury to another;
>
> (2) Ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand;
>
> (3) The omission to use such care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another.
>
> 243 Mich at 305.

See, also, *People v. Layman,* 299 Mich 141, 299 NW 840 (1941); *People v. Keiswetter,* 7 Mich App 334, 151 NW 2d 829 (1967). Petitioner's claim that a licensed medical doctor, who infuses a patient with a medically unheard of dose of Sodium Pentothal (32), for a non-existing ailment (38-39) and leaves her unattended while the Sodium Pentothal is dripping into her arm (85) does not satisfy all the elements of Involuntary Manslaughter in Michigan is incredible. The testimony of Detective Sergeant Earl Teeples as set out at pages 16 and 17 of Petitioner's Brief support the factual inference that Petitioner had infused the deceased with Sodium Pentothal and left her unattended —notwithstanding Detective Teeples cross-examination which also *included* the following:

> "Q. Did Mr. Clark explain to you the procedure he followed that evening in administering Sodium Pentothal to Mrs. Neil?

A. *Yes; he said that he had started the drip treatment of Sodium Pentothal in this treatment room, and started the treatment, then went away and into another part of the building and closed the door, and left her in there alone.*

Q. Did he tell you how long he had remained there with her before he left the room?

A. I don't remember—I don't think he did. I don't recall him saying.

Q. Did he tell you how long this treatment required?

A. He said sometimes it would take half an hour and sometimes it would take an hour, depending on how fast it dripped.

Q. Did he say anything about leaving after the Sodium Pentothal had been absorbed into the body of Grace Neil?

A. Leaving the room?

Q. After she had absorbed it.

A. No, sir. He told me the treatment was going on and that he had checked it a couple of times, and that he had asked Mrs. Clark to check and see if it was still going or if it had completely dripped into her, and she had gone in to check and found that Mrs. Neil was dead." (Emphasis added.) (110-111).

The gist of Petitioner's conviction was not "the absence of Petitioner from the treatment room while his patient was being infused with a dangerous drug" (Petitioner's Brief, Pg. 18). The *gist* of the offense was, in the words of the Criminal Information, that Petitioner "did inject into the body of Grace Neil an excessive quantity of Sodium Pentothal and by so injecting the Sodium Pentothal into the body of Grace Neil, Ronald E. Clark did directly cause the death of Grace Neil, and thus improperly performed and grossely neglected the legal duty that he, as a physician, owed to Grace Neil" (See Criminal Information set out in full at Pg. 23 of Respondent's Appendix).

That there was competent testimony to substantiate this charge cannot be gainsaid by Petitioner (See, e.g. Pgs 46 and 123 of Trial Record). It is clear that the People charged and proved all elements of Involuntary Manslaughter as set forth in *People v. Orr, supra.* It is the law in Michigan that in a trial for Involuntary Manslaughter, additional acts of Petitioner's negligence are competent evidence, even if not specifically pleaded in the Criminal Information, if they are part of the *res gestae* of the offense. *People v. Keiswetter, supra.* Such was the case here.

What Petitioner is really asking this Court to do is to undertake a review of a State's Court's factual finding. Respondent concedes this Court's right to make an independent factual examination when the disputed facts concern a federal constitutional issue [*Napue v. Illinois,* 360 US 264, 3 L. Ed 2d 1217, 79 S. Ct 1173 (1959)], but here the real question is not one of federal constitutional law because assuming, *arguendo,* that even if Petitioner is correct that Respondent failed utterly in introducing any competent evidence that Petitioner left deceased unattended when she was being infused with Sodium Pentothal, *Thompson* would not require reversal since there is still competent testimony on each and every element of Involuntary Manslaughter pursuant to Michigan law. The Opinion of the Michigan Court of Appeals expressly found competent evidence that Petitioner infused his patient, Grace Neil, the deceased, with excessive amounts of Sodium Pentothal (See, Pg. 36a of Petitioner's Brief). Respondent understands the law to be that this Court will not reexamine a State Court's finding and conclusions of fact. *Watts v. Indiana,* 338 US 49, 93 L. Ed 1801, 69 S. Ct 1804 (1948); *Wolfe v. North Carolina,* 364 US 177, 196, 4 L. Ed 2d 1650, 80 S. Ct 1482 (1960).

Finally, Respondent respectfully points out that the alleged mis-quotation of fact during the Prosecutor's closing argument (Petitioner's Brief, Pg. 15) was received without objection by defense counsel. The Michigan Supreme Court has consistently ruled that a Defendant who fails to object to the Prosecuting Attorney's argument in the trial court is precluded from raising such alleged error on appeal. *People v. Rosa,* 268 Mich 462, 466, 256 NW 483 (1934); *People v. Robertson,* 301 Mich 100, 106, 3 NW 2d 26 (1942); *People v. Omacht,* 326 Mich 505, 511-14, 40 NW 2d 704 (1950). Respondent submits that Michigan's procedural rule of requiring objection in the trial court in order to save the issue for appellate review squares with *Henry v. Mississippi, supra.* See, also *Wolfe v. North Carolina, supra* at 195; *Johnson v. New Jersey,* 384 US 719, 735, 14 L. Ed 2d 882, 893, 86 S. Ct 1272 (1966).

III.

THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS NOT VIOLATED IN A STATE CRIMINAL CONVICTION OF INVOLUNTARY MANSLAUGHTER WHEN DEFENDANT IS CHARGED BY CRIMINAL INFORMATION WHICH SPECIFICALLY PLEADS CERTAIN ACTS OF GROSS NEGLIGENCE, AND WHEN THE STATE INTRODUCES OTHER COMPETENT EVIDENCE OF DEFENDANT'S GROSS NEGLIGENCE ADMITTEDLY NOT SPECIFICALLY PLEAD BUT WHICH ARE A PART OF THE RES GESTAE OF THE CRIME WITH WHICH PETITIONER IS CHARGED.

Petitioner's request that this Court interpret the substantive law of Manslaughter in the State of Michigan is certainly jurisdictionally improper. *Coleman v. Alabama,* 399 US 1, 9, 26 L. Ed 2d 387, 396, 90 S. Ct 1999 (1970); *Albertson v. Millard,* 345 US 242, 97 L. Ed 983, 73 S. Ct 600 (1953).

Even if Petitioner's allegation that the instant Criminal Information was somehow deficient from a due process standpoint was correct (which it is not), this Court's jurisdiction would not be properly invoked. Petitioner's conviction on the Involuntary Manslaughter Information is clearly valid under Michigan law. *People v. Ryczek*, 224 Mich 106, 194 NW 609 (1923); *People v. Keiswetter, supra.* Thus, Petitioner's conviction independently rests on a valid state ground. And it is

> "The settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment."
>
> *Cramp v. Board of Public Instruction,* 368 US 278, 281, 7 L. Ed 2d 285, 288, 82 S. Ct 275 (1961).

Wolfe v. North Carolina, 364 US 177, 4 L. Ed 2d 1650, 80 S. Ct 1482 (1960), precludes review of this issue by this Court because the Michigan Court of Appeals decided the matter squarely on state grounds. Thus, no federal question is here presented and jurisdictional reliance on 28 USC §1257(3) is misplaced. Furthermore, the Michigan Supreme Court denied Petitioner's request for Leave to Appeal. ". . . When, as here, the highest state court has failed to pass upon a(n) (alleged) federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary." *Street v. New York,* 394 US 576, 582, 22 L. Ed 2d 572, 89 S. Ct 1354 (1969). Not only was the alleged *constitutional* error not passed upon by the Michigan Supreme Court, but the Michigan Court of Appeals did not review the alleged *constitutional* error and Petitioner never presented the alleged constitutional error to the trial court.

CONCLUSION

This Petition for Writ of Certiorari presents no question worthy of this Court's attention. The questions advanced treat matters outside the settled record which are flagrantly improper. The Petition is devoid of a substantial federal question. The issues claimed have all been previously answered by this Court. The facts of this case simply do not apply to the settled legal issues relied upon by the Petitioner.

The State of Michigan is confident that this Court will find that Petitioner was free to exercise every legal right he possessed. He was convicted of a crime he committed, pursuant to a fair trial before an impartial jury in which he enjoyed the effective assistance of counsel.

For the foregoing reasons, it is respectfully submitted that the Petition for Certiorari be denied.

Respectfully submitted,

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Dated: June —, 1971

APPENDIX

NOVEMBER 13, 1968, ORDER OF MICHIGAN COURT OF APPEALS

At a Session of the Court of Appeals of the State of Michigan, Held at the Court of Appeals in the City of Lansing, on the 13th day of November in the year of our Lord one thousand nine hundred and sixty-eight.

Present the Honorable Thomas Giles Kavanagh, Presiding Judge; Louis D. McGregor, Timothy C. Quinn, Judges.

In this cause a motion to produce and a motion for trial transcript are filed by defendant-appellant and answers in opposition thereto having been filed, and due consideration thereof having been had by the Court,

It is Ordered that the motions to produce and for trial transcript be, and the same are hereby Denied.

State of Michigan—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 14th day of November in the year of our Lord one thousand nine hundred and sixty-eight.

/s/ Ronald Dzierbicki
Clerk

(Seal)

JUNE 11, 1969, ORDER OF MICHIGAN COURT OF APPEALS

At a Session of the Court of Appeals of the State of Michigan, Held at the Court of Appeals in the City of Lansing, on the 11th day of June in the year of our Lord one thousand nine hundred and sixty-nine.

Present the Honorable Louis D. McGregor, Presiding Judge; Robert J. Danhof, T. John Lesinski, Judges.

In this cause a motion to remand has been filed by appellant and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

It is Ordered that the motion to remand, be and the same is hereby Denied.

It is Further Ordered that appellant be granted an extension of thirty days in which to file his brief.

State of Michigan—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 13th day of June in the year of our Lord one thousand nine hundred and sixty-nine.

/s/ Ronald L. Dzierbicki

(Seal) Clerk.

SEPTEMBER 28, 1970, ORDER OF THE MICHIGAN COURT OF APPEALS

At a Session of the Court of Appeals of the State of Michigan, Held at the Court of Appeals in the City of Detroit, on the 28th day of September in the year of our Lord one thousand nine hundred and seventy.

Present the Honorable T. John Lesinski, Presiding Judge; Charles L. Levin, Robert J. Danhof, Judges.

This cause having been brought to this Court by appeal from Oakland County Circuit Court, and having been argued by counsel, and due deliberation had thereon, it is now ordered by the Court that, the judgment of the Oakland County Circuit Court be and the same is hereby affirmed.

State of Michigan—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 20th day of October in the year of our Lord one thousand nine hundred and seventy.

/s/ Ronald L. Dzierbicki,
Clerk

(Seal)

JANUARY 22, 1971, ORDER OF MICHIGAN SUPREME COURT

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 22nd day of January in the year of our Lord one thousand nine hundred and seventy-one.

Present the Honorable Thomas M. Kavanagh, Chief Justice, Eugene F. Black, Paul L. Adams, Thomas E. Brennan, Thomas G. Kavanagh, John B. Swainson, G. Mennen Williams, Associate Justices.

On order of the Court, the application for leave to appeal is considered, and the same is hereby Denied, for the reasons that defendant and appellant has failed to persuade the Court that he has a meritorious basis for appeal or that the decision of the Court of Appeals was clearly erroneous.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 22nd day of January in the year of our Lord one thousand nine hundred and seventy-one.

/s/ Donald F. Winters,
Clerk.

(Seal)

CRIMINAL INFORMATION

State of Michigan,
County of Oakland—ss. The Circuit Court for the County of Oakland

In the Name of the People of the State of Michigan, S. Jerome Bronson, Prosecuting Attorney in and for said County of Oakland, who prosecutes for and on behalf of the People of the said State in said Court, comes now here in said Court in the November term thereof, A. D. 1967, and gives the said Court to understand and be informed that Ronald E. Clark, M.D. late of the Twp. of Farmington in said County, heretofore, to-wit, on the 3rd day of November A. D. 1967 at the said Twp. of Farmington in said County, a licensed physician, did treat one Grace Neil as his patient, and in the said treatment Ronald E. Clark did then and there owe the legal duty of due professional care and caution to Grace Neil, and while so treating the said Grace Neil, Ronald E. Clark did feloniously kill Grace Neil, by his gross and culpable negligence, in that he, the said Ronald E. Clark, did inject into the body of Grace Neil an excessive quantity of Sodium Pentothal, and by so injecting the Sodium Pentothal into the body of Grace Neil, Ronald E. Clark did directly cause the death of Grace Neil, and thus improperly performed and grossly neglected the legal duty that he, as a physician owed to Grace Neil, and committed Manslaughter, contrary to Section 750.321 of the Compiled Laws of 1948: M.S.A Section 28.553. (*Maximum penalty—15 years*) contrary to the form of the Statute in such case made

and provided, and against the peace and dignity of the People of the State of Michigan.

S. Jerome Bronson
By: Ronald E. Covault
Assistant Prosecuting Attorney

(List of Witnesses followed on the reverse side.)

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

* * * * *

(67) POSNER, IRWIN B., being first duly sworn, testified as follows:

Direct Examination

By Mr. Leitman:

* * * * *

(73) Q. * * * What was the nature of this conversation you had with Dr. Clark, Doctor?

A. I asked Dr. Clark if he could tell me of some of the events that led up to the death of his patient.

Q. Did you specifically ask him why he was treating Mrs. Neil, for what symptoms, what diseases?

A. I did.

Q. What, if anything, did he say?

A. He said that he was treating her for heart disease, hyper- (74) tension—which is high blood pressure—and obsesity, which is overweight.

Q. I see.

Now, did you ask or did you have an opportunity to observe his medical records regarding Grace Neil?

A. I did.

Q. Now, what, if anything, unusual did you notice on them?

A. I noticed a figure of one hundred and seventy.

Q. One hundred and seventy.

A. Yes, sir.

Q. Do you know what that figure meant?

A. I asked Dr. Clark, and he said that was the weight of the patient.

Q. Now, this was on Mrs. Grace Neil's medical chart, is that correct, or records?

A. Yes, sir.

Q. The figure one seventy?

A. Yes, sir.

Q. And he said that was her weight?

A. Yes, sir.

Q. What did you say, if anything, in response to that?

A. I said that Mrs. Neil didn't look like she weighed more than one twenty to one hundred twenty-five pounds.

Q. What, if anything, did he say in response to that?

A. And he said no, on second thought, that wasn't her weight, (75) that was his own weight.

Q. That was his weight?

A. Yes, sir.

Q. Of one hundred seventy pounds, on her medical record?

A. Yes, sir.

Q. Doctor, in your practice as a physician and surgeon, did you ever have an opportunity to put your own personal statistics or characteristics on your patients' medical records?

A. No, sir.

Q. Did you know of any physician who does this?

A. No, sir.

Q. Did you have an opportunity to ascertain from Dr. Clark how much Sodium Pentothal he had administered to Grace Neil?

* * * * *

(39) KUTOB, S. DAVID, being first duly sworn, testified as follows:

(40) *Direct Examination*

By Mr. Bain:

* * * * *

(46) Q. (By Mr. Bain): Would you tell us how you arrived at that conclusion, Doctor?

A. The fact that no pathology has been found, the fact that Dr. Olsen indicated that the subject has been in a normal healthy condition and the fact that there is a concentration of thiopental in the blood above, beyond and above, general anesthetic concentration which in my opinion is competent with lethal doses.

Q. And what was your opinion as to the cause of death?

A. The effect or overdose of Sodium Pentothal.

Q. Doctor, after you ran the test on the blood, did you have occasion to run any other tests on any other portions of the body that had been submitted to you?

A. Recently, I did; as a matter of fact, last week.

Q. And what portion of the body did you have occasion to examine at that time or to analyze?

A. The brain.

Q. And how was that test conducted?

A. It is in a very similar manner to the test I ran on the blood.

Q. What do you use, Doctor, to conduct the test? What portion (47) of the test was the fluid or solid portion?

A. Well, in this case, I took the whole specimen of brain supplied by the autopsy. And the modification and methodology was to—since everybody is familiar with the brain, how it looks like, it is a semi-solid material—in order to succeed in extracting it, it is necessary to homogenize

it and take the homogenate and extract it, exactly using the method I used on blood.

Q. And, Doctor, what were the results of the examination of the brain matter?

A. The result, the brain showed the presence of sodium thiopental in a concentration of 17.1 milligram per hundred grams of brain.

Q. Doctor, when you say, "sodium thiopental," is that another name for Sodium Pentothal?

A. Sodium Pentothal and sodium thiopental are synonymous.

Q. Doctor, for the jury's and my sake, could you explain why the concentration of Sodium Pentothal in the brain would be so much higher than that in the blood?

A. Sodium Pentothal is a drug that has a great affinity to distribute itself in fat or lipid material. Now, the brain has a higher concentration of fat than does the blood. And for this reason, it tends to concentrate itself in the fatty material of the brain. And for this reason, I find that there is much higher concentration in the brain than I did find in the blood.

(48) Q. Doctor, in the case of the death due to an overdoes of Sodium Pentothal, what actually causes the death in terms of the body functions?

A. Well, it is generally believed that death is due to circulatory collapse. However, cases studied in which death was as a result of Sodium Pentothal showed to a second degree that a cardiac failure is another cause for death. And a third possibility is respiratory failure.

In this case, I don't know which came first.

Q. Doctor, which basic group or general group of drugs does Sodium Pentothal belong to?

A. It belongs to the group we classify as barbiturates.

Q. And how many times have you had occasion to make examinations for this family of drugs?

A. Well, without—we are receiving at least two or three cases a week. So, since 1966, it is a little bit complicated to calculate. But the average, two to three cases, I screen for bartiturates.

Q. How often in that period of time have you found specifically the drug Sodium Pentothal?

A. None in tissue, I recall.

Q. Now, other than the drug Sodium Pentothal, or thiopental, was there any other foreign substance in Grace Neil's blood?

A. I failed to detect the prlesence of any other substance in Grace Neil's blood.

(49) Q. Did you detect any other substance in that portion of her brain which you had occasion to examine?

A. I failed to detect any other substance in the brain, either.

Q. Have you ever had occasion to publish any articles on barbiturates, Doctor?

A. Research that involved the use of barbiturates, yes.

Q. Now, is there such a thing that a person who is administered Sodium Pentothal, for example, over a long period of time or a period of time, would build up a tolerance to it?

A. Well, sir, we have to define what you mean by "tolerance" here. If you mean that increase, you have to increase the dose in order to sedate or cause hypnosis in a person, yes. But there is no tolerance to a lethal dose in normal individuals that I know of.

Q. Briefly stated, then, it might take more to put me asleep but the limit for my death would remain the same?

A. Would remain the same.

Q. Doctor, did you have occasion to check the blood type of Mrs. Neil?

A. No, sir, I haven't; I didn't do it.

Q. Do you know whether or not that blood type was checked?

A. It was checked.

Q. Are there any studies available regarding Sodium Pentothal, professionally published studies?

A. Studies, yes. But it depends on what you mean by —what kind of studies do you have—

(50) Q. Experiments, so to speak.

A. Experimentation, yes.

Q. Would that be experimentation or human beings or on animals?

A. Mostly on animals; and there are some studies on human beings, too.

* * * * *

(117) RIEDERS, DOCTOR FREDERIC, being first duly sworn testified as follows:

Direct Examination

By Mr. Bain:

* * * * *

(122) Q. As you know, Doctor, the testimony has revealed that Grace Neil died approximately at 8:00 o'clock, or within an hour one way or the other, on the evening of November 3. The next morning, an autopsy was performed on her body by Dr. Olsen and Dr. Olsen could find no cause of death that was due to any disease or any injury.

Subsequent to that time, a toxicological examination was conducted by Dr. Kutob; and in the course of that examination, he found that the blood of Grace Neil contained 3.1 milligrams percent of Sodium Pentothal, and that the brain tissue that he examined contained 17.1 percent milligrams of Sodium Pentothal.

The testimony has also revealed that Grave Neil weighed approximately one hundred and twenty-five pounds.

Based on these facts, are you able to form an opinion as to the cause of Grace Neil's death?

A. Yes, I can.

Q. And what is that opinion, Doctor?

(123) A. It is my opinion, on the basis of what you have told me and what I know from my discussion with Dr. Kutob, which is essentially the same, that Grace Neil died of Pentothal poisoning resulting from the administration of Pentothal Sodium in too large a dose and too rapidly, both. That means she died rather quickly in the course of the administration of a large dose or fairly rapid administration of a large dose of Pentothal. Based on these concentrations, I am reasonably sure of that. And I am also reasonably sure that the quantity that was in her body at the time of her death was in excess of one and somewhere between one and two grams of Pentothal.

Q. Doctor, could you tell the jury what, if any, is the significance of the fact that the blood contained 3.1 milligrams percent and the brain tissue examined by Dr. Kutob contained 17.1 milligrams percent?

A. Well, there are several significant points to this. First of all, the level of 3.1 milligrams—or roughly 3 milligrams—is one which is entirely high enough to be in and of itself the cause of death.

The brain level is extremely high and indicates—this ratio between blood and brain—and indicates that the drug went in rapidly and went in in large quantities, rapidly into circulation and was very quickly picked up by the brain and quickly built up to this level at which point I guess she died—at which she did die—(124) and which the uptake stopped. The brain sucks Pentothal up out of the blood as it goes in very quickly. This is why a person goes under so quickly with Pentothal. So that the ratio is an indication of the speed and massive dose that went in.

Q. And from the percentages that we have discussed in Grace Neil's body weight, Doctor, did you indicate that you were able to arrive at an opinion as to how much she had been administered?

A. Yes. On the basis of these concentrations and on her body weight, it is my opinion, with a high degree of certainty, that the total amount that was given to her exceeded one gram and was somewhere between one and two grams.

* * * * *

(252) GORDON, DR WILLIAM E., being first duly sworn, testified as follows:

Direct Examination

* * * * *

(268) Q. (By Mr. Leitman): Doctor, is there, in this type of therapy, a recommended maximum number of dosages to give to any patient?

(269) A. Well, yes, sir. Where it has appeared to be indicated, one may do this on one, two, three or four occasions; perhaps as many as seven, eight or ten times. Ordinarily, one, two or three occasions will be sufficient.

Q. So, then, it is extremely short-term treatment; is that correct?

A. Yes, sir. And if it is going to help to resolve the problem, it will help in a very short time, perhaps a week, week and a half or two weeks.

Q. Doctor, it has been testified to by Dr. Rieders that in his expert opinion there was between one and two grams of Sodium Pentothal in the body of Grace Neil at the time of the autopsy. And he further testified that he felt that this much, between one and two grams of Sodium Pentothal, could have been administered in fifteen to

thirty minutes—or probably was, to a high degree of certainty, administered within fifteen to thirty minutes.

Now, what kind of a dose is that as far as psychiatric use goes?

A. I would think it would be a completely unheard of dose, and there would be no indication for that kind of dose that I could comprehend.

Q. Now, when you say, "unheard of," is it because it is too little or too large?

A. Too large.

* * * * *

(327) KUTOB, DOCTOR S. DAVID, being first duly sworn, testified as follow:

Cross Examination

By Mr. Leitman:

* * * * *

(328) Q. Isn't it a fact, also, Dr. Kutob, that upon the Defense's request, the Prosecution—through you—made these samples available for the Prosecution—excuse me—for the Defense to examine?

A. Yes, sir.

Q. That is to say that everything you have examined and testified to the jury, any part was turned over to the Defendant; (329) is that not correct?

A. That's right, sir.

Q. And the Defendant had an opportunity, through counsel, to make his own independent examination; is that not correct?

A. Yes, sir.

Mr. Leitman: That will be all, Doctor.

* * * * *

(252) GORDON, DOCTOR WILLIAM E., being first duly sworn, testified as follows:

Direct Examination

By Mr. Leitman:

* * * * *

(265) Q. Thank you.

Now, Doctor, these various reactions that you have told the jury about which one who is anesthetized under Sodium Pentothal may react, did you know these complications before you become a psychiatrist, that is in your general medical education leading to your medical degree?

A. I knew these before I left medical school, yes, sir.

Q. You do not teach in medical school, do you?

(266) A. Not at this time, no.

Q. Have you since you graduated from medical school?

A. I did in '53 and '54.

* * * * *

(144) ALEXANDER, DOCTOR GAYLORD, being first duly sworn, testified as follows:

Direct Examination

* * * * *

(149) Q. I see.

Doctor, when you are personally giving a patient Sodium Pentothal, do you ever leave that person unattended?

A. Never under any circumstances.

Q. Why is it?

A. Well, it is just too lethal a drug. You are administering a general anesthetic and would never administer a general anesthetic to any person and leave them un-

attended. Their airway could obstruct. They could vomit and aspirate. Their blood pressure could fall out. A number of things could happen to this patient if you weren't there to correct it.

Q. So, you would never leave the patient unattended?

A. Never.

(150) Q. Do you say this as an anesthesiologist only or does the average medical doctor, is he taught that also?

A. I am sure that the average medical doctor certainly going through school today is taught that. And I can't imagine anyone using a drug like this without staying in contact with the patients.

Q. I see.

Do you have an opinion, Doctor, as to what type of medical practice it would be for one to administer Sodium Pentothal to a patient and then leave that patient completely unattended?

A. Well, it would be my personal opinion that this would be really malpractice and negligence.

Q. Can you state that to a reasonable medical certainty?

A. Yes, I feel I could.

Q. Doctor, have you ever heard of a patient being treated for heart disease or high blood pressure with therapeutic doses of Sodium Pentothal?

A. No, I have never heard of a patient being treated for these conditions with Pentothal. As a matter of fact, we tend to avoid this drug in patients with heart disease.

* * * * *

(227) SWEET, DOCTOR ROBERT B., being first duly sworn, testified as follows:

Direct Examination

By Mr. Bain:

* * * * *

(239) Q. Doctor, would you have an opinion as to whether or not it would ever be good medical practice to begin to administer a drip to a patient and then walk off and leave them for some period of time?

(240) A. I feel very strongly this is, in my opinion, gross negligence, medical negligence, to leave the patient when he is either getting Pentothal drip or has gotten it and has not recovered from it.

Q. Doctor, what precautions do you take in your hospital or what is the procedure after a person has been administered the Sodium Pentothal and then you stop and they are taken out of the operating room? What precautions are taken?

A. These patients are never left alone. We—whoever administers the anesthetic takes the patient back with either a nurse or some other individual—sometimes the surgeon, if it is from surgery—will accompany the patient back on a stretcher or on his bed. We take them to what we call a recovery unit, where the patient will receive special nursing care, constant observation, until the individual is awake enough, alert enough, to be able to cerebrate, be able to say what his name is, where he lives, how old he is, where he is at that time; so that if he has any problems, he can make these known if he goes back to his room where he doesn't have this constant observation. So, we don't return the patient from this constant care until he is alert.

Q. Doctor, in and of itself, is Sodium Pentothal of any therapeutic value or does it cure heart disease?

A. It isn't that kind of a drug. Pentothal is not a drug to treat illnesses. It produces a state in which other therapy sometimes, such as surgery, can be carried out to treat (241) a patient. But the drug itself is not considered a therapeutic drug.

Q. Doctor, you are familiar with coronary thrombosis, are you?

A. Yes, sir.

Q. Based on your experience, would you say that you are able to establish the cause of death of a particular person as being coronary thrombosis by looking at them?

A. No; one can't make that diagnosis, in my opinion, by looking at a person.

Q. Is it true, Doctor, that to establish coronary thrombosis as the cause of death, an autopsy would have to be performed?

A. Yes, sir.

Q. Doctor, I am going to hand you People's Exhibit #2, a series of six pictures of a room, and ask you if you would examine those pictures, please.

Have you had a chance to look at them?

A. Yes.

Q. Doctor from looking at those pictures, could you tell us whether or not you would consider the room that these pictures represent a proper environment for the giving of Sodium Pentothal?

Mr. Rowston: Objection, your Honor.

The Court: State it.

Mr. Rowston: It has not been determined that this man has any experience in the facilities used in private offices. All of the testimony relates to (242) administration of this drug under hospital facilities. I think it is a matter of opinion on his behalf, anyway, it is a matter of personal judgment.

I have no objection to his testifying as to what is used in a hospital, if he wishes. But I think his opinion, whether or not this is adequate equipment, is immaterial.

The Court: He may answer. Overruled.

The Witness: Would you restate the question?

Mr. Bain: Yes.

Q. (By Mr. Bain): You have had a chance to look at these pictures, Doctor. Would you say that—in your opinion, is this the proper environment to give Sodium Pentothal in?

A. I would think not.

Q. And do you see any of the—did you see any of these pictures any of the equipment that you have discussed with us?

A. None of the equipment was observable in that series of pictures that I saw.

* * * * * *

(85) TEEPLES, DETECTIVE EARL, being first duly sworn, testified as follows:

Direct Examination

By Mr. Bain:

* * * * *

(110) Q. Did Dr. Clark explain to you the procedure he followed that evening in administering Sodium Pentothal to Mrs. Neil?

A. Yes; he said that he had started the drip treatment of Sodium Pentothal in the treatment room, and started the treatment, then went away and into another part of the building and closed the door, and left her in there alone.

Q. Did he tell you how long he had remained there with her before he left the room?

A. I don't remember—I don't think he did. I don't recall him saying.

Q. Did he tell you how long this treatment required?

A. He said sometimes it would take half an hour and sometimes it would take an hour, depending on how fast it dripped.

Q. Did he say anything about leaving after the Sodium Pentothal (111) had been absorbed into the body of Grace Neil?

A. Leaving the room?

Q. After she had absorbed it,

A. No, sir. He told me the treatment was going on and that he had checked it a couple of times, and that he had asked Mrs. Clark to check and see if it was still going or if it had completely dripped into her, and she had gone in to check and found that Mrs. Neil was dead.

* * * * *

(32) OLSEN, DOCTOR RICHARD, being first duly sworn, testified as follows:

Direct Examination

* * * * *

(37) Q. (By Mr. Bain): Did you have the occasion to examine the heart of Mrs. Neil, Doctor?

A. Yes.

Q. What did your examination of that heart reveal?

A. Her heart was completely normal for her age. It was in good condition.

Q. And did you have occasion, Doctor, to make whatever examination would be necessary to determine whether or not Mrs. Neil had suffered from high blood pressure?

A. Yes.

Q. And what were the results of that examination—strike that.

How do you conduct that particular examination?

A. High blood pressure produces enlargement of the heart to pump the blood against the increased resistance. The kidneys usually show changes associated with it. I found no such evidence present. The kidneys and the heart were normal. There was no enlargement of the heart.

Q. Doctor, were you able to determine from your examination of the heart whether or not Grace Neil had ever suffered from coronary thrombosis?

A. She had not.

Q. Based on your medical experience, are you able to estimate—or were you able to estimate—the approximate weight (38) of Grace Neil?

A. I thought her weight was about average for a middle-aged woman of her age. She was about five feet tall, and I thought she weighed possibly one hundred twenty-five, or thereabouts, pounds. She had reached the age when women tend to accumulate a little excess weight.

Q. Was she obese in any manner?

A. I would not consider it so. Though I am rather old and the modern, ultra-slim model may not be quite my ideal.

Q. Doctor, if Mrs. Neil had any other type of heart defect, would that have shown up in the autopsy?

A. Yes.

Mr. Bain: Thank you, Doctor.

I have no further questions.

* * * * *